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VERSUS Keller, Thomas C., etc.

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**PETITION
FOR WRIT OF
CERTIORARI**

85-84

NO.

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FILED

MAR 18 1985

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CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1984

JOHN M. HAGERTY

Appellant/Petitioner

VERSUS

**SUCCESSION OF LAURA McCLOSKEY CLEMENT,
ET AL**

Appellee/Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**Jesse S. Guillot
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327P

QUESTIONS PRESENTED FOR REVIEW

11 Was John M. Hagerty Denied his due process under Amendment V of the Constitution of the United States of America and deprived of his civil rights under Title 42, Section 1983 U.S.C. by the Louisiana State Court, when that court dismissed his attorney of record four days prior to trial and forced Hagerty to go through Civil Litigation without the assistance of counsel and without an opportunity to subpoena his witnesses? U.S. Constitution Amendment V; Louisiana Constitution of 1974, Art. 2, 3, 4, 22.

2. Does a litigant have access to the Court, when a State Judge forces him to trial four days after the Trial Court dismisses his attorney and forces him to trial without an opportunity to engage new counsel and without the opportunity of summoning his witnesses? *Johnson vs. Abernethy* (1969) 393 U.S. 483; 89 S.Ct. 747.

PARTIES TO THE PROCEEDINGS

1. John M. Hagerty, represented by:

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Clerk of the United States Fifth Circuit
Court of Appeal
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

JOHN M. HAGERTY

Appellant/Petitioner

VERSUS

SUCCESSION OF LAURA McCLOSKEY CLEMENT,
ET AL

Appellee/Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit on December 17, 1984, rendered an opinion in which it concluded that the Federal District Court was correct in dismissing Hagerty's suit for lack of subject matter jurisdiction and for failure to state a claim. (See copy of opinion at Appendix A)

JURISDICTION

The jurisdiction is invoked under Title 28, U.S.C. Section 1254 (1) applying for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit rendered on 12/17/84.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"....nor shall any person....be deprived of life, liberty or property, without due process of law...."

Louisiana Constitution of 1974 Art. 2 on Due Process, Art. 3 provides for equal protection of the laws, Art. 4 provides for rights to property and Art. 22 provides as follows:

"All Courts shall be open, and every person shall have an adequate remedy by due process."

STATEMENT OF THE CASE

The petitioner, John M. Hagerty, a nephew and closest living relative of Laura McCloskey Clement, brought suit in the State Civil District Court for the Parish of Orleans, to contest the probate of Clement's will. Clement died on April 5, 1978, at the age of 96. The petitioner sought to overturn his aunt's will on the basis that it lacked the necessary form in that it was not executed in the presence of a Notary and two witnesses and that at the time of its execution, she lacked the mental capacity to make the will.

Trial was set for May 12, 1980. On May 8th, petitioner's new attorneys withdrew. The petitioner appeared before the Trial Court and requested a continuance. The petitioner pointed out he did not have time to obtain another attorney or to summon his witnesses, noting his previous attorneys did not subpoena the witnesses. *The*

trial court refused to grant a continuance and forced Hagerty to trial without benefit of counsel and without his witnesses.

On the day of trial, the petitioner again objected to the proceedings going forward and then stood mute, refusing to present evidence stating he could not proceed without counsel. The attorney for the Estate presented evidence of the validity of Clement's will, and the trial court promptly entered judgment dismissing petitioner's suit with prejudice. Petitioner appealed to the Louisiana Fourth Circuit Court of Appeals arguing the trial court abused its discretion in refusing to grant the continuance. The appellate court affirmed the trial court's ruling. After the Louisiana Supreme Court denied petitioner's application for writs, Hagerty brought an action under 42 U.S.C. Section 1983 in the United States District Court for the Eastern District of Louisiana, requesting that the Louisiana District Court be ordered to reset his trial and allow him sufficient time to obtain counsel and to summon his witnesses.

In this federal action, the petitioner contends that the Louisiana Trial Court, by refusing his request for a continuance, *deprived him of his constitutional right of due process by forcing him to go through a litigation without assistance of counsel and without witnesses.* He requested the Federal District Court order the Orleans Parish Civil District Court to reinstate his Petition of Intervention. The defense filed a motion to Dismiss for Failure to state a claim and for lack of subject matter jurisdiction. The Federal District Court granted the motion and dismissed the suit on May 2, 1984. Petitioner appealed to the 5th Circuit Court of Appeals which affirmed the lower court's rul-

ing on December 7, 1984.

Petitioner now seeks writs of certiorari with this Honorable Court to review the rulings of the Appellate Court.

ARGUMENT FOR GRANTING THE WRIT

Petitioner instituted proceedings in Federal Court under Title 42, Section 1983, U.S.C. claiming he was denied his basic civil rights and due process to which he is entitled as a litigant because he was summarily ordered to trial without an attorney and without being allowed to obtain civil process on his witnesses. The actions of the trial court denied him access to the Courts as provided by the Louisiana State Constitution of 1974 and by the United States Constitution. Courts have recognized that access to the courts is founded in due process clause of the United States Constitution, as well as Section 1983 of the Civil Rights Act. *The right of access to the courts is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.* Further, the access does not pass muster in a constitutional sense unless that access is adequate, effective and meaningful. *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed. 2nd 718 (1969).

Clearly, the actions of the state district court judge deprived the petitioner his day in court. By forcing the petitioner to trial without an attorney and without process of witnesses, it cannot be said that the state district court provided the petitioner adequate, effective and meaningful access to the courts. In so doing that court abused its

discretion in denying the petitioner due process and depriving him his civil rights.

The standard of review for appellate court reviewing a judgment of dismissal is stated in *Conley v. Givson*, 355 U.S. 41, 78 S.Ct. 99, (1957):

"In appraising the sufficiency of the complaint we follow...the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In his original federal petitioner, petitioner set-forth the pleaded theory that he was denied access to the Louisiana Courts by being denied the right to a hearing with an attorney and a minimal time to obtain civil process on witness. Given this complaint, it cannot be said that it appears beyond a doubt that petitioner could not prove any facts in support of his claim. Thus, the Federal District erred in dismissing the Petitioner's complaint.

CONCLUSION

In view of the facts and conclusions of law and considering the procedural and substantive denial of minimal due process and civil rights as set forth in the petitioner's original complaint, it is respectfully submitted that the federal district court erred in dismissing the petitioner's complaint. Also, the United States Court of Appeal for the 5th Circuit decided the petitioner's appeal in a way probably not in accord with applicable decisions of this Honorable Court. Therefore, petitioner respectfully re-

quests that this Honorable Court grant his petition for writ of certiorari to review the judgment of the United States Court of Appeal for the 5th Circuit, dismissing the petitioner's suit.

RESPECTFULLY SUBMITTED,

THOMAS BAUMLER

PROOF OF SERVICE

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared,

THOMAS BAUMLER

who declared unto me, Notary, that he is the attorney for John M. Hagerty;

That he hereby certifies that on this day he has served copies of the foregoing application for writ to the United States Court of Appeals, on Edward D. Wegmann and Dan Foley, by mailing same to their addresses, as described in this writ, placing same in the United States Mail, postage prepaid, this the day of June, 1985, at New Orleans, Louisiana

THOMAS BAUMLER

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 19th DAY
OF JUNE, 1985.

NOTARY PUBLIC

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APPENDIX A

John M. HAGERTY, Plaintiff-Appellant,

v.

SUCCESSION OF Laura McCloskey

CLEMENT, et al,

Defendants-Appelles.

No. 84-3353

Summary Calendar.

United States Court of Appeals,

Fifth Circuit

Dec. 17, 1984.

Decedent's nephew, who was unsuccessful in state court probate suit challenging aunt's will, brought a § 1983 action against the estate, executor of the will, state trial judgem and clerk of court. The United States District Court for the District of Louisiana, Fred J. Cassibry, J., dismissed with prejudice for failure to state a claim and for lack of jurisdiction, and appeal was taken. The court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) District Court lacked jurisdiction; (2) decedent's nephew failed to state a claim under § 1983 against any of the defendants; and (3) award of double costs and attorney fees was appropriate against both the nephew and his attorney for bringing a frivolous appeal.

Judgment affirmed; appellees' motions granted.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WILLIAMS, JOLLY and HILL, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

I.

The appellant, John M. Hagerty, brought suit in Louisiana state court to annul his aunt's will. After he received three continuances but was denied a fourth, the appellant was forced to trial without counsel. The trial judgment dismissed the suit with prejudice and the appellant appealed to the Louisiana Fourth Circuit Court of Appeals. That court affirmed the trial court's refusal to grant a fourth continuance and dismissal of the case. After the Louisiana Court of Appeals denied a rehearing, the Louisiana Supreme Court unanimously denied the appellant's petition for a writ of certiorari or review. Having failed in state court, the appellant brought suit under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Louisiana against his aunt's estate, the executor of his aunt's will, the state trial judge, and the clerk of court. He alleged that these defendants denied his right to due process by failing to give him his "day in court." On motion of the defendants, the district court dismissed the suit and Hagerty now appeals. We affirm the district court's ruling that it had no subject matter jurisdiction over this action and that the appellant failed to state a claim upon which relief could be granted. In addition, because this appeal is frivolous, we assess double costs and attorney's fees against the appellant and his attorney.

II.

The appellant, John M. Hagerty, a nephew and closes living relative of Laura McCloskey Clement, brought suit to contest the probate of Clement's will. Clement died

on April 5, 1978 at the age of ninety-six, and her will was probated the following day. Hagerty's intervention was filed in proper person and in forma pauperis on July 14, 1978, while he was incarcerated in a federal correctional institution. Hagerty sought to overturn the will on the grounds of fraud and lack of testamentary capacity.

After Hagerty was paroled he obtained an attorney who amended the pleadings and further alleged formal defects in the probated will. Trial was set for May 14, 1979, but a second continuance was requested by Hagerty's attorney and granted on June 21, 1979. On motion of the executor of Clement's estate, Thomas C. Keller, the case was again set for trial, this time on January 29, 1980. Hagerty's attorney, however, withdrew from representation because of continued differences between himself and Hagerty. Hagerty obtained new counsel and on January 21, 1980, eight days before the trial, Hagerty's new attorneys requested and received a third continuance. Trial was reset for May 12, 1980, but on May 8, Hagerty's new attorneys withdrew, citing differences with Hagerty that they could not resolve. The following day Hagerty appeared before the trial court and requested a fourth continuance. Hagerty contended that no witnesses had been subpoenaed by his prior attorneys and that he had insufficient time to obtain other counsel for trial or to serve process upon witnesses. The trial court refused to grant a fourth continuance.

On the day of trial, Hagerty appeared before Judge Melvin J. Duran, objected to the proceedings going forward and then stood mute. Keller's attorney offered to present prima facie evidence of the validity of Clement's will, but Judge Duran instead promptly entered judgment dismissing Hagerty's suit with prejudice. Hagerty then ap-

pealed to the Louisiana Fourth Circuit Court of Appeals. He argued that the trial court abused its discretion in refusing to grant the fourth continuance. The appellate court, finding that the three prior continuances had caused a three-year delay in the implementation of Clement's will, affirmed the trial court and held that it did not abuse its discretion in failing to grant the fourth continuance. The appellate court, finding that the three prior continuances had caused a three-year delay in the implementation of Clement's will, affirmed the trial court and held that it did not abuse its discretion in failing to grant the fourth continuance. After the Louisiana Supreme Court unanimously denied Hagerty's petition for a writ of certiorari or review, Hagerty brought an action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Louisiana.

In his federal action, Hagerty contended that the state trial court, by refusing his request for a continuance, deprived him "of his constitutional right of due process...by forcing him to go through a litigation without assistance of counsel and without witnesses." He requested the federal district court to order the Orleans Parish Civil District Court to reinstate his Petition of Intervention, or alternatively, to award damages. Hagerty named as defendants in his action the Succession of Laura McCloskey Clement (Succession), Thomas C. Keller, the executor of the estate, Melvin J. Duran, the state trial judge who dismissed the action, and Dan Foley, Clerk of the Orleans Parish Civil District Court.

The appellees moved for dismissal of the action for lack of subject matter jurisdiction and failure to state a claim. The federal district court granted the motions of the

appellees and dismissed the suit on May 2, 1984. On May 3, 1984, new counsel was enrolled of record for Hagerty. By and through his new attorney, Hagerty filed a timely notice of appeal on May 9, 1984, which is now before this court.

III.

Hagerty raises two issues on appeal: whether the state trial court denied him due process of law, and whether the federal district court erred in dismissing his claim. Since resolution of the second issue is dispositive of this appeal, it is not necessary to reach the first point of contention. We hold that the federal district court did not err in dismissing Hagerty's claim. The basis for our decision is that the district court had no subject matter jurisdiction over this section 1983 action, and that Hagerty failed to state a claim upon which relief could be granted. We further find that this appeal is frivolous, and, assess double costs and attorney's fees against Hagerty and his attorney.

IV.

A.

[1, 2] The federal district court dismissed Hagerty's action under Fed.R.Civ.P. 12 (b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. We hold that the court was correct in dismissing the action under Rule 12(b)(1). Hagerty presented his constitutional due process claims to the Louisiana Court of Appeals and the Louisiana Supreme Court, but those courts rejected his arguments. The record clearly reflects that Hagerty then used his section 1983 action to attack the validity of the state trial court's dismissal of his suit contesting the probate of his aunt's

will. He did so notwithstanding the well settled rule that a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action. *Sawyer v. Overton*, 595 F.2d 252, 252 (5th Cir.1979); see also *Williams v. Tooke*, 108 F.2d 758, 759 (5th Cir.), cert. denied, 311 U.S. 655, 61 S.Ct. 8, 85 L.Ed. 419 (1940). The constitutional claims presented by Hagerty to the federal district court, if not identical, were "inextricably intertwined with the state court's denial" of relief; therefore the district court could not have properly reviewed the state court decision. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16, 103 S.Ct. 1303, 1315 n. 16, 75 L.Ed.2d 206 (1983); *Howell v. State Bar of Texas*, 710 F.2d 1075, 1076-77 (5th Cir.1983). To the extent that there was any constitutional error in the Louisiana state courts' decision, sole recourse for Hagerty was to the United States Supreme Court, not to federal district court. See *Kimball v. The Florida Bar*, 632 F.2d 1283, 1284 (5th Cir.1980); *Sawyer v. Overton*, 595 F.2d at 252; accord *Wood v. Orange County*, 715 F.2d 1543, 1546 (11th Cir.1983).

Hagerty raised his constitutional claims in state court but the Louisiana state courts rejected them. He could have appealed to the United States Supreme Court pursuant to 28 U.S.C. § 1257(3), but he failed to do so. Hagerty instead sought review of those same claims in federal district court under section 1983, but Supreme Court and Fifth Circuit precedent clearly prohibits such review. The federal district court, therefore, correctly dismissed Hagerty's suit for lack of subject matter jurisdiction.

B.

We are further called upon to address Hagerty's contention that the federal district court erred in dismissing his action for failure to state a claim. His contention before the federal district court was that the state trial court denied his federal constitutional right to due process by refusing to grant a fourth continuance. Ordinarily we would not be inclined to give this issue any attention since the judgment in its entirety can be affirmed for lack of subject matter jurisdiction. However, to further demonstrate the frivolousness of the appeal, we will address Hagerty's contentions.

[3-5] We begin by noting that Hagerty named Dan Foley, the Clerk of the Orleans Parish Civil District Court, as a defendant in his complaint, but failed to allege any act or omission on Foley's part that caused him injury. Furthermore, the nature of the alleged constitutional violation would seem to eliminate even the possibility that Foley could have been a party to the claimed offense. Section 1983 affords relief only for conduct committed by persons acting under color of state law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155-56, 98 S.Ct. 1729, 1732-33, 56 L.Ed.2d 185 (1978); *Thibodeaux v. Bordelon*, 740 F.2d 329, 332 (5th Cir.1984). A person acts under color of state law only when he exercises power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law. *Id.* at 333. Foley was without power or authority under state law to grant or deny continuances and therefore he could not have been responsible for the denial of Hagerty's request for continuance. In addition, Hagerty did not allege any sort of conspiracy involving Foley that was designed to deprive him

of his constitutional rights. His allegations are wholly conclusory and are not accompanied by facts, which if proven would entitle him to relief. *Id.* at 332 n. 2; *Augustine v. Doe*, 740 F.2d 322, 325 n. 6 (5th Cir.1984). The federal district court properly dismissed the claim against Foley.

[6] Next, we hold that the district court did not err in dismissing the claims against the Succession and Thomas Keller. To sustain an action under 42 U.S.C. § 1983, the plaintiff must prove that the defendant, acting under color of state law, deprived him of a right secured by the Constitution and laws of the United States. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970). Section 1983 does not reach purely private conduct. *District of Columbia v. Carter*, 409 U.S. 418, 424, 93 S.Ct. 602, 606, 34 L.Ed.2d 613 (1973); *see also Dahl v. Akin*, 630 F.2d 277, 279-80 (5th Cir.1980). Hagerty makes no claim that Keller or the Succession conspired with the state trial court to deprive him of his constitutional right to due process. In fact, his complaint contains no allegations or facts concerning Keller or the Succession at all, only a conclusion that he is entitled to damages. Our review of the record clearly indicates that Keller and the Succession are purely private parties who were not acting under color of state law. Accordingly, they are not subject to a suit under the fourteenth amendment. Even if they were acting under color of state law, however, Hagerty has stated no facts which, if proven, would entitle him to relief. The claims against Keller and the Succession were properly dismissed.

[7, 8] Finally, we hold that the federal district court did not err in dismissing the claim against the state trial judge, Melvin J. Duran. The United States Supreme Court

has clearly established that the assertion of judicial immunity is an absolute defense in a suit challenging a ruling or order of a court under 42 U.S.C. § 1983. *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980). Judicial officers are immune from liability for damages resulting from their judicial function. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967); *Watts v. Graves*, 720 F.2d 1416, 1420 (5th Cir.1983). Judge Duran is a party to this lawsuit only because he exercised his judicial discretion in a case properly before his court. The federal district court, therefore, properly dismissed the claim against Judge Duran.¹

V.

The appellees move to dismiss Hagerty's appeal as frivolous pursuant to Fifth Circuit Rule 42.2 and to award double costs and attorneys' fees to them under Fed.R.App.P. 38 and 28 U.S.C. § 1912. The appellees also request sanctions against Hagerty's attorney pursuant to 28 U.S.C. § 1927.²

¹ We note that Judge has since died and there has been no amendment of the complaint to include his estate or any heir thereto in this suit.

² 28 U.S.C. § 1927 (1982) entitled *Counsel Liability for Excessive Costs* provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1912 (1982) entitled *Damages and Costs on Affirmance* provides: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the

A.

[9-11] Courts of appeals may award damages, including attorney's fees and single or double costs, to an appellee when an appeal is frivolous. 28 U.S.C. § 1912 (1982); Fed.R.App.P. 38; *Lonsdale v. L.L. Smelser*, 709 F.2d 910, 911 (5th Cir.1983); *Cummings v. United States*, 648 F.2d 289, 298 & n. 6 (5th Cir.1981); *Exhibitors Poster Exchanged, Inc. v. National Screen Service Corp.*, 543 F.2d 1106, 1107 (5th Cir.1976) (per curiam). An appeal is frivolous when it involves legal points not arguable on their merits. *Howard v. King*, 707 F.2d 215, 220 (5th Cir.1983). In this case, Hagerty's legal contentions lack any arguable merit, and are long-settled against him. *Id.* at 220; *Lonsdale v. Commissioner of Internal Revenue*, 661 F.2d 71, 72 (5th Cir.1981) (per curiam). He has imposed an unnecessary burden on this court and has infringed upon the rights of the appellees who are entitled to a prompt adjudication of this dispute, which has been protracted in one form or another for more than six year. See *Maneikis v. Jordan* 678 F.2d 720, 722 (7th Cir.1982), *cert. denied sub nom.*, 459 U.S. 990, 103 S.Ct. 346, 79 L.Ed.2d 386 (1982). His appeal is clearly frivolous, this is an appropriate case in which to impose sanctions under Rule 38 and 28 U.S.C. 1912.³

(footnote 2 continued)

prevailing party just damages for his delay, and single or double costs."

Rule 38 of the Federal Rules of Appellate Procedure entitled *Damages for Dealy* provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

³ We base our decision to impose sanctions against Hagerty upon Fed.R.App.P. 38 and 28 U.S.C. § 1912. Section 1912 provides that "the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." Rule 38 is entitled "Damages

B.

We recognize, however, that ignorance of the elements of a section 1983 cause of action and a willful disregard of the jurisdictional requirements of the federal district court are at least equally attributable to Hagerty's attorney. See *Maneikis*, 678 F.2d at 722; *Simon & Flynn, Inc. v. Time, Inc.*, 513 F.2d 832, 835 (2d Cir.1975). To impose damages and costs upon Hagerty alone will not guarantee that his attorney will be directly affected or that he will be deterred from bringing similar frivolous appeals in the future. *Maneikis*, 678 F.2d at 722. The policy underlying the imposition of assessing part of the damages and costs arising from this appeal personally against Hagerty's attorney under section 1927.

[12] Section 1927 should be strictly construed because it is pena' in nature. *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1382 (5th Cir.1979), *aff'd in relevant part sub nom. Roadway Express, Inc. v. Pipe*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1295 (5th Cir.1983) (Tate, J., dissenting). We therefore are mindful that we should not perfunctorily assess damages against Hagerty's attorney.

(footnote 3 continued)

for Dealy," but the body of the rule only provides that damages may be awarded for frivolous appeals. The appellees in this case have notg actually alleged that this appeal has caused unreasonable dealy; however, "the courts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in dealy." *State of Texas v. Gulf Water Benefaction Co.*, 679 F.2d 85, 87 n. 1 (5th Cir.1982); Fed.R.App.P. 38 Advisory Committee Notes; see also *Cummings v. United States*, 648 F.2d 289, 293 & n. 6 (5th Cir.1981); *Dunscombe v. Sayle*, 340 F.2d 311, 311 (5th Cir.), *cert. denied*, 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965).

In considering the present case, however, we are guided by our recent precedent. See *Lweis v. Brown & Root, Inc.*, 711 F.2d at 1292; *Self v. Self*, 614 F.2d 1026, 1028 (5th Cir. 1980) (per curiam).⁴ In *Lewis v. Brown and Root, supra*, we found that a joint award of attorneys' fees by the district court against a plaintiff and his attorney was warranted. 711 F.2d at 1292. There the plaintiff brought a civil rights action against his employer, alleging discrimination because he had been discharged and not rehired on the basis of his race. *Id.* at 1288. We found that the action was frivolous, unreasonable and without foundation because the plaintiff could not demonstrate, even by inference, any unlawful discrimination. *Id.* at 1291. We therefore upheld the district court's joint assessment of attorneys' fees against the plaintiff and his counsel. *Id.* at 1292.

Equally instructive for us today is the panel opinion on rehearing which responded to the defendant's motion for an assessment of attorney's fees and double costs on appeal. *Lewis v. Brown & Root, Inc.*, 722 F.2d 209, 210 (5th Cir. 1984) (per curiam). The panel concluded that "the appeal was in great part frivolous, unreasonable and without foundation, and that, in view of the record, it largely constituted an unreasonable and vexatious multiplication of the proceedings of the case..." It therefore remanded to the district court for a determination and award of attorney's fees and double costs for the appeal. *Id.*

⁴ In *Rodeway Express, Inc. v. Piper*, 447 U.S. 752, 757-59, 100 S.Ct. 2455, 2459-61, 65 L.Ed.2d 488 (1980), the Supreme Court held that attorneys' fees could not be assessed against a litigant's attorney pursuant to 28 U.S.C. § 1927. Congress, however, amended the statute in 1980 expressly to allow such an award. Pub.L. 96-349, 94 Stat. 1156 (codified as amended at 28 U.S.C. § 1927 (1982)). See *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1292 n. 7 (5th Cir. 1983).

Here, counsel for Hagerty has cited only one case in his entire brief to support his position that the federal district court erred in dismissing Hagerty's claim. Moreover, he did not even attempt to address the jurisdictional issue, which is the very essence of the district court's judgment. See *Maneikis*, 678 F.2d at 722. This appeal is certainly frivolous, and it has unreasonably and vexatiously multiplied the proceedings in a case that has been in the courts for more than six years. Sanction under section 1927 are clearly warranted. We therefore grant the appellees' motions to award double costs and attorneys' fees against Hagerty and his attorney, but rather than determining the amounts and the apportionment between Hagerty and his attorney on appeal, we remand to the district court for those determinations. See *Lewis*, 722 F.2d at 210; *Exhibitors Poster Exchange*, F.2d at 1107.

VI.

In summary, we affirm the district court's dismissal of this action for lack of subject matter jurisdiction and failure to state a claim. Further, because the appeal is frivolous, we grant the appellees' motions to assess double costs and attorneys' fees against the appellant. Attorneys' fees and double costs will be determined and apportioned between Hagerty and his attorney on remand. We therefore remand to the district court for further proceedings not inconsistent with this opinion.

JUDGMENT AFFIRMED MOTIONS OF APPELLEES GRANTED.

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APPENDIX B

MINUTE ENTRY
APRIL 18, 1984
CASSIBRY, J.

JOHN M. HAGERTY	CIVIL ACTION
VERSUS	NO. 83-459
SUCCESSION OF LAURA	
McCLOSKEY CLEMENT	SECTION "FJC" (5)
ETC.	

This matter was heard in open court on December 7, 1983 on the following motions:

1. Motion of plaintiff John M. Hagerty for reinstatement of his intervention in Civil District Court, Parish of Orleans, State of Louisiana;

2. Motion of defenants Dan Foley, Clerk of Orleans parish Civil District Court, and Melvin J. Duran, Judge, Civil District Court to dismiss for failure to state a claim.

The motions were argued by counsel for defendants, and Arthur Dumaine, Esq., who appeared as counsel for plaintiff John M. Hagerty without having filed any oppositions to the defendants' motions, was given two days to file oppositions. No oppositions have been filed.

On December 12, 1983 the plaintiff in proper person filed a motion to continue these matters so that the Court could appoint an attorney to represent him.

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IN IS ORDERED that the motion to continue these matters is DENIED.

After due consideration of the merits of the motions heard on December 7, 1983,

IT IS ORDERED that the motion of plaintiff to reinstate his intervention is DENIED.

IT IS FURTHER ORDERED that the motion of defendants Thomas C. Keller, Testamentary Executor, and the Succession of Laura McCloskey Clement to dismiss is GRANTED.

IT IS FURTHER ORDERED that the motion of defendants Dan Foley and Melvin J. Duran to dismiss is GRANTED.

UNITED STATES SENIOR DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN M. HAGERTY *

*

VERSUS *

*

SUCCESSION OF LAURA * CIVIL ACTION:
MCCLOSKEY CLEMENT * NO: 83459
* SECTION: E MAG.5

THOMAS C. KELLER *

TESTAMENTARY *

EXECUTOR, ET AL *

* * * * *

COMPLAINT

John M. Hagerty, a person of age claims the sum of
THREE HUNDRED THOUSAND DOLLARS
(\$300,000.00) in damages plus punitive damages and at-
torney's fees in the following action:

1.

That on April 5, 1978 Laura McCloskey Clement,
died in Orleans Parish in the State of Louisiana: that her
estate was opened in Proceedings No. 78-5065, of the Civil
District Court, and the defendant Thomas C. Keller, was
appointed Testamentary Executor.

2.

That Thomas C. Keller, is the proper person upon
which service ought to be made for the Succession of Laura
McCloskey Clement.

3.

That John McCloskey Hagerty filed a Petition of In-
tervention on July 19, 1978 contesting the probate of the
Last Will of the deceased and opposing further proceeding
to dispose of the estate of his aunt.

4.

That in the Petition of Intervention he claims that
the affairs of his aunt, the decedent were conducted under
a fraudulent power of attorney.

5.

He claims in the Petition of Intervention, that his
aunt had lost her memory and was physically and mentally
incapable of executing a will as far back as 1972; he claims
his aunt had a stroke years ago and had been confined to
a wheelchair and did not know her surroundings.

6.

John McCloskey Hagerty, filed a suit in the nited
States District Court, No. 77-1255, entitled John
McCloskey Hagerty versus Laura McCloskey Clement, t
Al, and the Metairie Cemetery Association, to protect his
interest in a cemetery plot in the decedent estate.

7.

That originally, he was represented in the Succession
Proceedings by David Gatler, who withdrew as his at-
torney; that thereafter he was represented by Tucker,

Schonekas, and Andry.

8.

That petitioner, employed Tucker, Shonekas and Andry to prepare for a trial scheduled for May 12, 1980.

9.

That on May 8, 1980 just 4 days prior to the trial he discovered that his attorneys *had not prepared* for trial and had not subpoenaed the witnesses he had requested to be subpoenaed.

10.

That the Civil District Court for the Parish of Orleans, 4 days prior to the trial date permitted Tucker, Schonekas and Andry the attorneys for petitioner to withdraw as his attorney and on May 12, 1980 forced the petitioner to go to trial on his Petition of Intervention, without an attorney representing him and without allowing sufficient time for him to obtain the services of another attorney to subpoena the witnesses which his attorney had not subpoenaed.

11.

That upon the withdrawal of his attorneys, petitioner attempted to employ other attorneys but was unable to because of the insufficiency of time. He was unable to subpoena the witnesses because of the insufficiency of time caused by the inadequacy of his attorneys Tucker, Schonekas and Andry, whom this Civil District court had permitted to withdraw 4 days prior to the trial date.

12.

The Civil District Court refused to grant the delay.

On May 12, 1980 the case was called to trial, and proceeded over his protest. The Trial Court refused to allow him sufficient time to subpoena his witnesses or to employ an attorney: that upon the conclusion of the presentation of evidence by the executor of the estate, the Civil District Court rendered Judgment dismissing the Intervention filed by John M. Hagerty.

13.

That petitioner filed an appeal to the Louisiana 4th Circuit Court of Appeals but that court affirmed the Judgment of the Trial Court; that a rehearing was denied on September 17, 1981 and a Writ to the Supreme Court of the State of Louisiana was denied; that the failure to grant the continuance under the circumstances *deprived John M. Hagerty of his constitutional right of due process and deprived him of his civil right by forcing him to go through a litigation without assistance of counsel and without his witnesses; that delay from 30 to 60 days would not have injured the Estate proceedings and would have insured petitioner his civil rights and not denied him due process.*

14.

That John M. Hagerty, was deprived his day in court; that he had no control over the fact that his attorney Tucker, Schonekas and Andry withdrew 4 days prior to the trial.

15.

That he had no control and no supervision over the subpoenaing of witnesses in preparation for his trial on May 12, 1980.

16.

For the Civil District Court's refusal to grant him a continuance in order to obtain a new attorney, deprived petitioner of his day in court and violated *the elementary due process guaranteed by Article I of the Constitution of Louisiana and by the 14th Amendment* of the United States Constitution and it deprived John M. Hagerty of his civil rights.

17.

Plaintiff, has incurred financial losses and expenses and emotional distress and damages due to the intentional deprivation of his constitutional rights.

18.

Plaintiff is entitled to, and demands a hearing to "Order the Judges of Civil District Court for the Parish of Orleans to reinstate the trial proceedings in No.78-5065 entitled Succession of Laura McCloskey Clement on Petition of Intervention filed by John M. Hagerty for a hearing, allowing him 90 days notice to prepare for trial and subpoena his witnesses.

19.

Alternatively, plaintiff prays for damages in these proceedings in the sum of THREE HUNDRED THOUSAND DOLLARS (\$300,000.00) WHEREFORE, John M. Hagerty prays that this court order the Succession of Laura McCloskey Clement, Thomas C. Keller, as Testamentary Executor, Judge Melvin J. Duran and Dan Foley, Clerk of the Civil District Court to show cause why an order should not be issued by this Court directing the Civil District Court for the Parish of Orleans to reinstate the Petition of Intervention Proceedings No. 78-5065 entitled

OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
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BETTER COPY CAN BE OBTAINED, A NEW FICHE
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SUPREME COURT OF THE UNITED STATES

JOHN M. HAGERTY v. THOMAS C. KELLER,
EXECUTOR OF THE SUCCESSION OF
LAURA McCLOSKEY CLEMENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-84. Decided November 4, 1985

The petition for writ of certiorari is denied.

CHIEF JUSTICE BURGER.

I agree that we should deny the petition for certiorari, but would award respondents costs and fees under Rule 49.2. The time has come—indeed it is long past—when the Court should enforce Rule 49.2 or strike it. This petition, like much which preceded it, is utterly frivolous. On this record I can only conclude that petitioner and his counsel have filed actions designed to delay the orderly settlement of the estate of respondent's decedent. This misuse of judicial processes should subject the attorney who filed the petition here to the sanction of Rule 49.2.¹

On July 14, 1978, petitioner brought suit in Louisiana state court to contest the probate of the will of his Aunt, Laura Clement. Petitioner requested and received no fewer than three continuances. The trial was finally set for May 12, 1980. Three days before trial, petitioner requested and was denied a fourth continuance.

On the day of trial, petitioner appeared before Judge Melvin Duran, objected to the proceedings, offered no evidence, and stood mute. Judge Duran accordingly dismissed the suit with prejudice. The intermediate state appellate court unanimously affirmed. *Succession of Clement*, 402 So. 2d

¹ Rule 49.2 provides: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages."

702 (La. App. 1981). That court noted that petitioner had "succeeded in delaying implementation of Mrs. Clement's bequests for three years, possibly longer if this matter goes to a higher court." The court concluded that Judge Duran had not abused his discretion, after granting three continuances, in refusing to grant a fourth. The Louisiana Supreme Court unanimously declined to review the case. 407 So. 2d 733 (La. 1981).

Petitioner then brought a 42 U. S. C. § 1983 action in the United States District Court for the Eastern District of Louisiana. Petitioner contended that the State trial court, by refusing his request for a fourth continuance, had deprived him of due process of law. He named as defendants the Clerk of the Orleans Parish Civil District Court, Dan Foley; the succession of Laura Clement; the executor of the will, Thomas Keller; and Judge Duran. The defendants, respondents in this Court, moved for dismissal of the action. The District Court correctly granted the motion, concluding that the complaint should be dismissed for lack of subject matter jurisdiction and for failure to state a claim. Petitioner then took an appeal to the United States Court of Appeals, Fifth Circuit.

That Court unanimously affirmed, holding that the District Court had properly dismissed the action on jurisdictional grounds. Petitioner's suit was brought in the face of the "well settled rule" that a plaintiff may not seek reversal of a state court judgment simply by casting his complaint in the form of a civil rights action; Supreme Court and Fifth Circuit precedent "clearly prohibit[ed]" the effort made by petitioner. The Court of Appeals also held that the District Court had properly dismissed petitioner's suit for failure to state a claim. The court explained that ordinarily it would not be inclined to give this issue any attention since the District Court's judgment in its entirety could be affirmed for lack of subject matter jurisdiction. However, "to further

demonstrate the frivolousness of the appeal," the court addressed this point as well, concluding that the trial court had properly dismissed the claims against all defendants on this basis.¹

The court assessed double costs and fees against both petitioner and his attorney under Federal Rule of Appellate Procedure 38 and under 28 U. S. C. §§ 1912 and 1927; it held that petitioner had imposed an unnecessary burden on it and had infringed upon the right of respondents to have a prompt adjudication of this dispute. The court noted, however, that awarding costs against petitioner alone would not deter his attorney from bringing similar frivolous appeals in the future. The court therefore remanded to the District Court for an apportionment of the amount of damages between petitioner and his attorney.

Petitioner continued to protract these proceedings by seeking a writ of certiorari in this Court. In his filing to this Court, however, petitioner did not attempt to refute the careful analysis of the Court of Appeals. Although peti-

¹Petitioner had named as a defendant Dan Foley, the Clerk of the Orleans Parish Civil District Court. But Foley was without any power or authority under state law to grant or deny continuances. Moreover, there was no allegation that Foley was involved in any sort of a conspiracy to deprive petitioner of his constitutional rights. Indeed, the complaint did not even allege any act or omission on Foley's part that caused injury. Petitioner had also named the succession of Laura Clement and Thomas Keller, the executor of the estate, as defendants. But, the Fifth Circuit noted, in order to sustain an action under § 1983, the plaintiff must prove that the defendant, acting under color of state law, deprived him of a right secured by the Constitution and laws of the United States. Petitioner had not alleged that either the succession or Keller had conspired with the state trial court. In fact, petitioner's complaint contained no allegation or facts concerning either of these defendants, only the conclusion that petitioner was entitled to damages from them. Finally, the Fifth Circuit considered the claims against state trial judge Melvin Duran. Judges are clearly entitled to absolute immunity from § 1983 suits involving actions taken in their judicial capacity. Petitioner had sued Judge Duran only because he exercised his judicial discretion in a case properly before his court.

tioner was clearly confronted with numerous adverse precedents from this Court and from other courts, he advanced no "good faith argument for an extension, modification, or reversal of existing law." ABA Code of Professional Responsibility DR 7-102(A)(2).

It is evident, therefore, that petitioner and his counsel have filed in this Court a completely frivolous petition as the most recent in a series of patently unfounded suits, whose effect has been to keep issues involving decedent's will in state and federal courts for more than seven years. Since this appears to be a case where "unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success," *Talamini v. Allstate Insurance Co.*, — U. S. — (1985) (STEVENS, J., concurring), I would award respondents \$1000.00 against Jesse S. Guillot, Esq., petitioner's attorney.